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Employment Contracts After Epic SCOTUS Decision: Arbitration Agreements and Class Waivers

TUESDAY, OCTOBER 30, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Employment Contracts After EPIC SCOTUS Decision: Arbitration And Class Waivers

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Strafford Webinar
October 30, 2018

OVERVIEW

- Overview of *Epic* ruling and impact on employment contracts
- Strategies for employers in drafting enforceable arbitration agreements and class waivers
- New legislation?
- Tactics to expect from plaintiffs' attorneys in light of the increasing use of class action waivers

EPIC SYSTEMS V. LEWIS

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612
- Issue Presented: Does the NLRA Prohibit Collective/Class Waivers in Employment Contracts So That Such Waivers Are Unenforceable In Employment Contracts Governed by the Federal Arbitration Act
- Three consolidated cases were heard, including the Seventh Circuit's ruling that the NLRA and FAA could be construed together to recognize that cases could be arbitrated but such waivers were not enforceable in the arbitral setting

EPIC SYSTEMS V. LEWIS

- NLRA Argument: Section 7 of the Act protects class and collective actions are "concerted activities"
- Section 7 protects "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §157

EPIC SYSTEMS V. LEWIS

- Holding (5-4): Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise
- Analysis:
  - The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select

EPIC SYSTEMS V. LEWIS

- The Act's saving clause (§2) which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," recognizes only "'generally applicable contract defenses, such as fraud, duress, or unconscionability" and not attacks on arbitration more generally
- While courts are to construe statutes together to effect to both, there cannot be repeal by implication and the term "other concerted activities for the purpose of . . . other mutual aid or protection" in the later-passed NLRA does not refer to class or collective actions or otherwise hint at displacement of the FAA; rather, phrase refers to such as things employees do for themselves in the course of exercising their right to free association in the work- place

EPIC SYSTEMS V. LEWIS

- No deference to NLRB because it is does not administer the FAA and because there is no conflict between the statutes
- Dissent: Both legal and practical
  - Practical: Contracts are not really freely entered into and contravenes NRLA's recognized history of protecting rights of employees to litigate collectively
  - Conclusion: "The court today holds enforceable this arm-twisted, take-it-or-leave-it contracts — including the provisions requiring employees to litigate wage and hours claims only one-by-one....Federal labor law does not countenance such isolation of employees."

EPIC SYSTEMS

- 1. Number 1 take-away of decision from Employer's perspective
- 2. Number 1 take-away of decision from Employee's perspective
- 3. What about class action waivers outside of arbitration agreements?

RESPONSES TO *EPIC SYSTEMS*

- How will Plaintiffs' class/collective action attorneys respond to *Epic Systems?*
  - Are there effective alternatives to class actions?
  - Is filing hundreds of individual arbitrations and therefore forcing the employer to settle a workable solution?

RESPONSES TO *EPIC SYSTEMS*

- What are management attorneys telling their clients to expect in litigation?
- How will companies respond to *Epic Systems*?
  - Interest in mandatory arbitration and class action waivers has increased

PROS AND CONS OF ARBITRATION

- Quicker
- Lower costs (?)
- No right of appeal
- Fewer summary judgment victories for defendants, more hearings
- No risk of runaway jury awards
- More compromise awards

DRAFTING TIPS

- Opt-out provisions
- Delegation clause
- Forum selection clause
- Who is covered?
  - All employees?
  - Applicants?

DRAFTING TIPS

- Roll-out only to new hires? To current employees?
- What claims are covered?
  - Claims that cannot be arbitrated by law
  - Preliminary relief
  - Exclude sexual harassment claims? (More later.)

WHAT TYPE OF PROGRAM?

- Arbitration only?
- Multi-step Alternative Dispute Resolution (ADR)?
  - Open door / management conferences
  - Peer review panel
  - Mediation
  - Binding arbitration

DRAFTING TIPS

- What works best in ADR and arbitration from the employees' point of view?

- Should arbitration agreements contain a confidentiality provision?
  - Should it be optional?
  - What should it cover?

PREPARE FOR UNCONSCIONABILITY CHALLENGES

- *Armendariz v. Foundation Health Psyche Services, Inc.* (California) says mandatory employment arbitration agreements must provide for:
  - neutral arbitrator
  - more than minimal discovery
  - a written award
  - all relief available in court
  - employees not required to pay unreasonable costs or any arbitrators' fees or expenses

A #METOO BACKLASH?

The New York Times | https://nyti.ms/2yV6c26

Opinion | OP-ED CONTRIBUTOR

Gretchen Carlson: How to Encourage More Women to Report Sexual Harassment

By GRETCHEN CARLSON OCT. 10, 2017

A #METOO BACKLASH?

Reforming arbitration laws is key to stopping sexual harassment. In the coming year, I'll be working to get bipartisan support for the Arbitration Fairness Act of 2017, which would keep mandatory arbitration clauses out of employment contracts, giving harassed workers the choice to go to court.

A LEGISLATIVE RESPONSE?

- Limiting employment arbitration
  - Passed: New York, Maryland, Washington, Vermont
  - Considering: Massachusetts, New Jersey, others
  - Preemption by Federal Arbitration Act?

A LEGISLATIVE RESPONSE?

- Ending Forced Arbitration of Sexual Harassment Act of 2017
  - Bars arbitration of *all* sex discrimination claims, not just harassment
  - Bipartisan bill
  - 50 Attorneys General letter

CALIFORNIA ISSUES: PAGA

- ***Iskanian v. CLS Transportation*** **(Cal. Sup. 2014)**
  - California Private Attorney General Act ("PAGA") claims not subject to arbitration
  - PAGA-only lawsuits to avoid arbitration?

PAGA IN OTHER STATES?

- Others to follow?
  - EMPIRE Act: New York's version of PAGA?
  - Connecticut, Illinois, Oregon, Vermont
- Do Plaintiffs' attorneys consider PAGA-type actions a reasonable substitute for class actions?
- How will the Supreme Court treat PAGA?

EMPLOYEES' RESPONSE

- Unions to use *Epic Systems* as a rallying cry to organize?

- Are employees becoming more aware of ADR and arbitration program?
  - If so, does it affect their decisions in choosing a job?

LOGISTICS OF THE ROLL-OUT

- Don't bury in an employment agreement or employee handbook
  - Stand-alone document? *Sanchez v. CarMax Auto Superstores of California, LLC*224 Cal.App.4th 398, 403 (2014).
- Attach, or clearly reference, rules that will govern any arbitration.

LOGISTICS OF THE ROLL-OUT

- Obtaining signatures/acknowledgments

- Best practice tips
  - Centralized team for roll-out
  - Signed agreements maintained in 2 locations

ELECTRONIC AGREEMENTS

- How to prove electronic distribution of agreements to all employees

- How to prove employee received and electronically acknowledged receipt

CAUTION IF CLASS CASES ARE PENDING

- Use caution when rolling out arbitration agreement while class action is pending.
- Courts may invalidate agreement on that basis alone.
- Consider carving out pending class actions.